IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLTON EMBRY,

Defendant.

OPINION AND ORDER

11-cv-36-bbc
07-cr-58-bbc

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Defendant Carlton Embry has filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel at his resentencing in this court, following remand of the case from the Court of Appeals for the Seventh Circuit. Defendant has shown that his trial counsel failed to raise a sentencing issue he could have raised but he has failed to show that the omission caused him any prejudice. Assuming for the purpose of deciding the motion that any competent counsel would have raised the issue, I am not persuaded that defendant can show that his sentence was affected by the omission. Accordingly, defendant's motion will be denied.

RECORD FACTS

In an indictment returned on April 18, 2007, defendant Carlton Embry was charged with knowing and intentional possession of five grams or more of crack cocaine with the intent to distribute it. He pleaded guilty to the charge and was sentenced on August 3, 2007 by Judge John C. Shabaz to a term of imprisonment of 265 months. At sentencing, defendant's offense level for advisory sentencing guidelines was 33 (a base offense level of 34 because he was responsible for more than 150 grams of crack cocaine and less than 500; a two-level increase for possession of a firearm in connection with the offense, reduced by 3 levels for acceptance of responsibility). With a criminal history category of VI, his advisory range of imprisonment was 235 to 293 months. He was a career offender, but because his offense level was higher under the applicable drug quantity guideline in U.S.S.G. § 2D1.1 than it would have been under the career offender guideline, the career offender guideline did not apply.

Defendant appealed his sentence to the Court of Appeals for the Seventh Circuit, which remanded the case for resentencing in light of Kimbrough v. United States, 552 U.S. 85 (2007), which had been decided after defendant's sentencing, to give this court a chance to consider the disparity in the sentences for crack and powder cocaine offenses. (Judge Shabaz was on medical leave at the time.) Before sentencing, I read the nine-page sentencing memorandum submitted by defendant's counsel, dkt. #22(in 07-cr-58) in which he argued

that because Kimbrough permitted sentencing judges to vary from the guidelines if they believed that the disparity in sentences for crack and powder cocaine sentences warranted a variance, this court should consider the disparity when resentencing defendant. Counsel made the point that both the crack cocaine guidelines and the career offender guidelines lacked any reasoned foundation and he urged the court to explain its reasoning if it decided to apply either the crack cocaine or career offender guidelines. Sent'g Mem., dkt. #22 (filed in 07-cr-58), at 4.

At resentencing, I reduced defendant's base offense level to 32 to ameliorate the effect of the discrepancy between the sentences for crack and powder cocaine offenses and reduced his sentence from 265 months to 188 months. (At the resentencing, defendant's advisory guidelines were determined by his career offender status, rather than by drug quantity, because his drug guidelines were reduced under U.S.S.G. Amendment 706.) I chose not to vary any further from the reduced advisory guideline, although Kimbrough would have permitted it. I stated on the record why I believed that the reduced sentence was appropriate and necessary, taking into consideration the purposes of sentencing under 18 U.S.C. § 3553(a), adding that "[a]ny additional reduction would minimize the serious nature of [defendant's] conduct and extensive criminal history." Sent'g trans., dkt. #31(07-cr-58), at 10.

Defendant appealed unsuccessfully from his new sentence. In an unpublished opinion

filed on August 10, 2009, the court of appeals held that this court had adequately explained the chosen sentence, dkt. #36 (07-cr-58), at 2, noting that although sentencing courts are free to choose a lower sentence because of policy disagreements with the guidelines for crack cocaine, they are not required to do so. Id. at 2-3. The court noted that defendant had "challenged the career offender guideline as unsupported by empirical data and a poor predictor of recidivism." Id. at 2. It added that the sentencing court "was unpersuaded, noting that [defendant's] repeated criminal activity indicated a high risk of recidivism" and that it had "offer[ed] a detailed explanation for why the sentence suggested by the [career offender guidelines] was appropriate for [defendant's] particular case." Id.

When defendant's appeal was rejected, he filed a petition for a writ of certiorari with the Supreme Court. The petition was denied on January 11, 2010. On November 29, 2010, defendant wrote to the court to ask both for appointment of counsel to represent him in connection with his motion for post conviction relief and for an extension of time in which to file such a motion. Dkt. #37. I construed the requests as motions and denied both in an order entered on December 2, 2010. Dkt. #38. Defendant moved for reconsideration of the order; his motion was denied in an order entered on January 13, 2011. In the interim, I had asked the federal defender to appoint counsel for defendant to help him present his arguments about his purported inability to file a timely post conviction motion. The defender appointed Mark Maciolek. Maciolek filed a motion on defendant's behalf on

January 14, 2011, explaining that he had been unable to obtain defendant's signature on the motion because defendant's case counselor was on vacation and no one else at the prison would agree to talk to defendant about the motion.

OPINION

Before I can consider defendant's challenge to his sentence, I must decide whether defendant's motion is timely. It is not. It was filed more than one year after his conviction became final, which was one year after the Supreme Court denied his petition for a writ of certiorari on January 11, 2010. 28 U.S.C. § 2255(f) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final"). In defendant's case, his time for filing expired on January 11, 2011, which was one year after his conviction became final. Fed. R. Civ. P. 6(a)(1)(A) (when specifying any time period stated in days or longer, the day of the event triggering the period is excluded). Defendant's motion was not filed until January 14, 2011. This may be the court's fault because I stated in the December 2, 2010 order that the Supreme Court had denied defendant's petition for a writ of certiorari on January 15, 2010, which was off by four days. Counsel for defendant was not appointed until December 29, 2010, so he had only days to prepare a motion on defendant's behalf, and he had difficulty obtaining defendant's signature on the motion for post conviction

relief. These problems do not constitute the egregious behavior that the Supreme Court has held would justify the tolling of § 2241's time limits, Holland v. Florida, 130 S. Ct. 2549, 2560 (2010), but they are strong reasons for tolling the time for filing in this case. The Court held in Holland that the "AEDPA statute of limitations defense is not jurisdictional. It does not set forth an inflexible rule requiring dismissal whenever its clock has run." Taking into consideration the short time counsel had in which to file a motion, the confusion created by the court's error on the date and the government's position that it does not oppose equitable relief in this case, I find that this is a case in which equitable tolling should apply.

Defendant's counsel argues vigorously that defendant's trial counsel was ineffective because he did not raise and preserve the issue of the crack and powder cocaine disparity as a reason for varying from the career offender guideline at defendant's resentencing. As the government points out in its brief in opposition, at the time of the resentencing the law in this circuit was in a state of flux. In a series of cases, the court of appeals had reached different conclusions about whether, under Kimbrough, judges were free to vary from the career offender guidelines for offenders convicted of crack cocaine offenses if the judges had policy differences with the crack cocaine guidelines. In United States v. Harris, 536 F.3d 798 (7th Cir. 2008), the court left the matter unclear. It said both that "our discussion should not be read to suggest that § 4B1.1 [career offender guideline] is any less advisory for

a district judge than the other sentencing guidelines," id. at 813, and

> [w]hile the sentencing guidelines may be only advisory for district judges, congressional legislation is not. As the First Circuit has explained, "the decision in Kimbrough—though doubtless important in some cases—is only of academic interest [in a case arising under the career offender guideline]." United States v. Jimenez, 512 F.3d 1, 9 (1st Cir. 2007).

The two comments are not readily reconcilable but the case has been cited for holding that the career offender guidelines are non-advisory, e.g., United States v. Liddell, 543 F.3d 877, 882-83 (7th Cir. 2009) (citing Harris, 536 F.3d at 803 as saying that "[t]o the extent that a sentencing disparity might occur under § 4B1.1 based upon the type of cocaine involved, it does not result from the now-advisory drug quantity table but is the product of a discrepancy created by *statute.").* In Liddell, the court indicated in dictum that a district court could not consider the crack/powder disparity in calculating the career offender guideline range, but that it could consider the disparity as a reason for issuing a below-guideline sentence. In United States v. Welton, 583 F.3d 494 (7th Cir. 2009), the court of appeals ruled that sentencing judges were *not* free to disregard the career offender guidelines under Kimbrough, although § 4B1.1 remained advisory. When this opinion was circulated to all judges of the court, three voted to hear the case en banc and filed a written dissent. The court of appeals overruled Welton in United States v. Corner, 598 F.3d 411, 416 (7th Cir. 2010), after the United States confessed error in a case raising the same issue, United States v. Vasquez, 130 S. Ct. 1135 (2010).

Against this backdrop, a careful lawyer would have raised the specific argument that the career offender guidelines were no less advisory than any other guidelines, especially because it is arguable that at the time of the resentencing, which occurred after Liddell had been decided, but before Welton, the law in the circuit would have supported such an argument. However, it takes more than a misstep to support a finding of constitutionally ineffective representation.

The test for constitutional ineffectiveness of counsel, established in Strickland v. Washington, 466 U.S. 668 (1984), has two components. The defendant must show both that counsel's representation fell below an objective standard of reasonableness, id. at 688, and that there exists a reasonable probability that the result of the proceeding would have been different had it not been for counsel's unprofessional errors. Id. at 694. In other words, even if a defendant can prove that his counsel was ineffective, he still must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

To show that he was prejudiced by his counsel's failure to argue that Kimbrough gave sentencing courts the freedom to vary downward from the career offender guideline if they disagreed with the crack/powder sentencing discrepancy, defendant would have to show that it was possible he would have received a lower sentence had his counsel argued for it.

Alternatively, he could pursue the argument that I understand him to be making, which is that if defendant's trial counsel had made the correct argument, he might have lost at the sentencing hearing and on appeal, but he would have preserved the issue. Had he done this, counsel argues, the likely outcome would have been that the Supreme Court would have remanded his case for resentencing in light of Vasquez, rather than denying his petition for a writ of certiorari four days before the decision in Vasquez was announced.

Neither of these outcomes was likely. A review of the sentencing transcript shows that both the Assistant United States Attorney and defense counsel argued that the court was free to treat both the career offender guideline and the crack/powder guidelines as advisory. Sent'g trans., dkt. #31 (in 07-cr-58), at 3-7. It is true that neither argued that the court could vary downward from the career offender guideline if it believed that the crack and powder cocaine disparity warranted doing so, but the effect was the same. I did vary downward from the original guidelines sentence that had been imposed before Kimbrough was decided, but only by two levels. (Defendant's counsel argues that the minimal two-level reduction in defendant's sentence shows that I believed that the only basis for a departure was 18 U.S.C. § 3582(c)(2), which allows a sentencing court to reduce a sentence if the sentencing commission lowers a guideline range, but the court of appeals found no basis for this reading of the sentence. United States v. Embry, 09-1246 (7th Cir. 2009), dkt. #36 (in 07-cr-58), at 3 (little merit to defendant's argument that district court failed to provide full

resentencing in light of Kimbrough but erroneously applied "the less robust procedure provided by 18 U.S.C. § 3582(c)(2)").)

When I sentenced defendant, I was aware that Kimbrough allowed me to give him any sentence consistent with the purposes of sentencing and below the statutory maximum. As my remarks at the sentencing hearing made plain, I would not have been inclined to give defendant a shorter sentence even if it had been clear at the time that I could vary from the career offender guidelines either because I found those guidelines not well considered or because I believed that the disparity between sentences for crack and powder cocaine required doing so. I was convinced at the time and I remain convinced that the sentence I gave defendant was both reasonable and necessary to carry out the purposes of sentencing. As I said then, no lesser sentence would have achieved that goal.

The court of appeals found that defendant received a full resentencing hearing at which counsel advanced all of defendant's policy objections to § 4B1.1 and § 2D1.1. Id. The court concluded that this court gave an adequate explanation for finding the sentence suggested by the career offender guideline appropriate for defendant's particular case. Id.

Defendant was not prejudiced by his counsel's failure to argue that the court was free to disregard the advisory career offender guideline because of the crack/powder disparity as well as because the guideline lacked a foundation based on objective evidence. It would not have changed his situation had defendant's counsel preserved the issue because it is unlikely

that the Supreme Court would have remanded for resentencing a case in which the court of appeals had found it clear that the court was aware of its authority to vary from the career offender guidelines and made it explicit that doing so would not carry out the purposes of sentencing.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). In this case, defendant has not made the necessary showing, so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Carlton Embry's motion for post conviction relief

under 28 U.S.C. § 2255 is DENIED.

FURTHER, IT IS ORDERED that no certificate of appealability shall issue.

Entered this 28th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge